No. 85-755

Supreme Court, U.S. IF I L E D MAR 5 1986

In The

Supreme Court of the United States

October Term, 1985

DELYNDA ANN RICKER BARKER REED,

Appellant,

PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF PRINCE RUPERT RICKER, DECEASED

Appellee.

On Appeal From The Court Of Appeals For The Eighth Supreme Judicial District of Texas

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

- 1. Whether Appellant's action should be dismissed because the appeal was improvidently granted.
- 2. Whether the present appeal should be dismissed for want of a substantial federal question.
- 3. Whether adjudication on the merits would constitute issuance of an advisory opinion which is forbidden under Article III to the United States Constitution.
- 4. Whether the United States Constitution or Trimble v. Gordon impact upon the state law with respect to the question of retroactivity.
- 5. Whether an illegitimate child who fails to inherit under the three possible methods of legitimation statutorily provided can claim an equal protection violation when the legislation in question is substantially related to a legitimate state goal.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, § 1, to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cited by this Appellee, but not cited by Appellant, in this brief, is Texas Family Code Annotated, Ch. 12, § 12.02 (b) effective September 1, 1975:

12.02. Relation of Child to Father

- (a) A child is the legitimate child of his father if the the child is born or conceived before or during the marriage of his father and mother.
- (b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage.
- (c) A child is the legitimate child of a man if the man's paternity is established under the provisions of Chapter 13 of this Code.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Eighth Supreme Judicial District, is reported at 682 S.W.2d 697 (Tex. App. 1984).

STATEMENT

Appellant seeks by this appeal entitlement as an illegitimate child to one-sixth of the Estate of Prince Rupert Ricker, Deceased.

On December 22, 1976, Prince Ricker died a judicially declared non compos mentis and intestate. Appellant was eighteen years of age.²

On February 16, 1978, Appellant filed in the estate a Notice of Heirship and Claim for \$21,600.00 in past child support.³ In June 1958, she filed an independent suit in the District Court on her child support claim.⁴ And, on February 27, 1979 she filed in the probate court an Application to Determine Heirship.⁵ All actions were consolidated and transferred to the District Court for trial.⁶

At trial, Appellant claimed to be the legitimate child of Prince Ricker by virtue of the purported 1957 Mexican marriage of Appellant's mother, Annabel Boutwell, and the deceased Prince Ricker.\(^7\) The purported Mexican marriage was void, because at the time of the alleged marriage, Prince Ricker was already lawfully married to Alice Rosemary Lawson, his first wife.\(^8\) Appellant alleged that upon the divorce of Prince Ricker and Alice Rosemary Lawson on February 28, 1958, a common law or putative marriage arose.\(^9\)

Annabel Boutwell testified that she and Prince Ricker were married in Juarez, Mexico before witnesses, although she did not know any of the witnesses present and lost the marriage certificate.¹⁰

"JA"-Joint Appendix

"R"—Reference to the record

Certified Certificates of Nonexistence of Records from the Civil Registries of Zaragosa and Ciudad Juarez, Chihuahua, Mexico showed no marriage.¹¹

Contrary to Appellant's statement that the "couple kept two households" (Appellant's Brief, p. 8, J. 1), Annabel Boutwell continued to live with her mother in Big Spring, Texas and Prince Ricker kept his residence in Stanton, Texas where he was teaching school. Annabel Boutwell testified that they would occasionally "live" together at the different addresses. Annabel Boutwell's maid testified that on some Monday mornings she would find his laundry. Prince Ricker kept some odds and ends in Big Spring and kept some clothes and other personal belongings in Stanton.

A search of the 1957-1958 school records failed to reveal whether or not Prince Ricker was single or married, but a teaching colleague was under the impression he was single. 16

Prince Ricker told his last wife, Marilyn Watts, in the presence of his father, that he never married Annabel Boutwell.¹⁷

No documentary evidence was produced at trial to substantiate Annabel Boutwell's claims that she and Prince Ricker held themselves out to the public as husband and wife.¹⁸

Prince Ricker and his first wife, Rosemary Lawson, were divorced February 28, 1958, two daughters being born of that marriage being Appellee, Princess Ann Ricker Campbell and Rosemary Jane Ricker Farrell.¹⁹

Annabel Boutwell never filed a petition for divorce,²⁰ a suit for child support, or to establish the paternity of

^{1.} For purposes of this appeal the following abbreviations mean:

[&]quot;D.Ex."—Defendant's (Appellee's) Exhibit "P.Ex."—Plaintiff's (Appellant's) Exhibit

JA 4-9; D.Ex. 17, R. 809-810; D.Ex. 18, R. 810; D.Ex. 33, 34; R. 828.

^{2.} P.Ex. 1, R.9.

^{3.} JA 11, 13.

^{4.} IA 15.

^{5.} JA 22.

^{6.} jA 33.

^{7.} JA 15, 53.

^{8.} D.Ex. 36, R. 834; P.Ex. 5, R. 108, 209; R. 37-38, 71-72, 787-788.

^{9.} IA 533.

^{10.} R. 37-39, 55, 89.

^{11.} D.Ex. 31, R. 816-822; R. 858-860.

^{12.} R. 37, 40, 72-75.

^{13.} R. 74-75.

^{14.} R. 120-121, 124-125.

^{15.} R. 60, 885-886.

^{16.} R. 775-781.

^{17.} R. 611, 615, 635.

^{18.} R. 44-45, 47, 50.

^{19.} P.Ex. 5, R. 106, 108, 209.

^{20.} R. 76-77, 99-100.

Prince Licker.²¹ No evidence was produced of any blood or tissue samples performed to establish the paternity of Prince Ricker to Appellant.

On October 20, 1958, Prince Ricker married Jeri Laverne.22

On October 27, 1958, four days before Appellant's birth, Annabel Boutwell went to Court and changed her name to "Ricker."23

Appellant was born November 1, 1958.24

Contrary to Appellant's contention that because Prince Ricker's name appeared on Appellant's birth certificate, clear and convincing evidence of paternity was established (Jurisdictional Statement, p. 6, n. 1), Reagan County Memorial Hospital's Director of Nurses testified it is usually the mother who fills out the information as "informant" in regard to the birth of a child. Appellant's birth certificate shows only Annabel Boutwell "Ricker" as informant, constituting no evidence that Prince Ricker acquiesced or even had knowledge of her actions.25 Prince Ricker was then legally married to another woman, Jeri Laverne.

Three months after Appellant's birth, Annabel Boutwell married Jerry Barker, who adopted Appellant in 1965,26

After Prince Ricker and Jeri Laverne divorced on January 4, 1960, he married Marilyn Watts on April 8, 1960. Three children were born of this marriage, being Prince Jr., Brett and Mark Ricker. Prince Ricker and Marilyn Watts lived together for seven years until their divorce on March 8, 1967.27

Marilyn Watts first learned of Annabel Boutwell about one month prior to her marriage to Prince Ricker when they went to inform Prince's father, Rupert P. Rick-

er, of their impending marriage.28 She learned that Annabel Boutwell had changed her name to "Ricker" and it was a source of embarrassment to the family.29 Prince Ricker told them that he did not marry Annabel Boutwell.30

Prince Ricker was an unreconstructed alcoholic. Reed v. Campbell, 682 S.W.2d 697, 698 (Tex.App. 1984). Sixteen admissions to hospitals and mental institutions were admitted from 1967 until his death, evidencing his chronic alcoholism, delusions, dementia, organic brain damage and related problems.31

A psychiatrist, Dr. Hornisher, met Prince Ricker in 1966 and treated him until 1975.32 In 1967, the doctor diagnosed severe cirrhosis of the liver and organic brain disease and wrote the Judge that it was in Prince Ricker's best interest that he be committed.³³ In 1968, he requested the appointment of a guardian, and Prince Ricker was committed again in 1969.34

About seven months prior to giving his deposition, Dr. Hornisher testified Annabel Boutwell and her lawyer came to see him wanting to know more about Prince Ricker. Annabel Boutwell claimed that she had been married to Prince Ricker at one time. That meeting was the first he ever heard of her.35

Cinderette McDaniel, Prince Ricker's sister, instituted proceedings to have Prince Ricker declared non compos mentis to preserve his estate. Prince Ricker was judicially declared non compos mentis on July 17, 1968 and a tempo-

^{21.} R.88-89, 97-98. 22. D.Ex. 20, R. \$13.

^{23.} P.Ex. 1, R. 3; D.Ex. 13, R. 803-805. P.Ex. 1, R. 3; D.Ex. 12, R. 57, 80°.

R. 709-716.

P.Ex. 6, R. 211; D.Ex. 12, R. 803; R. 59.

D.Ex. 20, R. 813; R. 608, 612; 616.

^{28.} R. 610.

^{29.} R. 612-615.

^{30.} R. 611, 615, 635.

^{31.} D.Ex. 22-30; R. 815-816.

R. 523, 531, 593.

^{33.} R. 563-566. Reginald McDaniel, a physician and Prince Ricker's brother-in-law, testified he also noted Korsakoff's syndrome in Prince Ricker as early as 1966 or 1967, a condition associated with chronic alcoholism, manifested by memory delusions, dementia, hallucinations, confabulations and peripheral neuropathy due to brain atrophy and toxic effects of alcohol. R. 459, 461, 483.

^{34.} R. 544, 571, 584.

^{35.} R. 594-595, 599-600.

rary guardianship over his person and estate was appointed for one year.³⁶ The guardianship continued through his death.³⁷ Although an attempt was made in 1975 to remove the guardianship, a jury found him incompetent.³⁸

Herb Gehring, manager of the La Posta Motor Lodge of El Paso, Texas, where Prince Ricker had become an "ultra permanent guest", testified Prince Ricker was unable to function, was unaware of the reality of his surroundings, and could not care for himself. Dontradicting Annabel Boutwell's testimony that she last saw Prince Ricker in 1968 or 1970 when he got out of the Big Spring State Hospital mental facility and who had seen him only once prior to that time in 1959 or 1960, Gehring testified that Annabel Boutwell and Appellant came to visit in the Spring, 1976 and August, 1976. They would stay a good portion of each day with Prince Ricker. After their first visit, Gehring noticed Appellant and her mother left a small color photograph of Appellant stuck in the mirror of Prince Ricker's room.

Appellant relies upon the testimony of Armando Mata Martel, an El Paso cab driver who chauffeured Prince Ricker, as evidence of Prince Ricker's recognition of Appellant as his child when he sought his advice on whether to allow Appellant's adoption by Jerry Barker. The evidence showed that he never even met the cab driver until after Appellant had already been adopted. (Appellant's Brief, pp. 8, 9, 11).

Appellant argues that Rube Ricker, Prince Ricker's mother, testified that Annabel Boutwell came to her when she was pregnant and told Rube Ricker that the father was Prince Ricker. Appellant ignores Rube Ricker's response

in the record when she said "Well, it is your word against his." (Appellant's Brief, p. 8, n. 1). 42

As evidence of paternity, Appellant relies on a conversation that took place in the home of Cinderette and Reginald McDaniel after Prince Ricker's discharge from Hazelden Clinic a few months prior to his death. (Appellant's Brief, pp. 8-9) In the rehabilitative book furnished by the clinic, Prince Ricker wrote, "Number 2, I was the father, reasonably sure, of a daughter out of wedlock. I justified it in the usual manner. She put it in the newspaper. I was conning Dad. There was an easier way." Cinderette then said "You mean Annabel." Reginald McDaniel said of the conversation, "my wife was running the conservation."

After Prince Ricker's death, Cinderette McDaniel filed an Affidavit of Heirship in the Deed Records of Reagan County, stating Prince Ricker had been married three times during his life; to Rosemary Lawson, Jeri Laverne and Marilyn Watts; that five children were born, being Princess Ann, Rosemary Jane, Prince Jr., Brett and Mark; and that Prince Ricker had no deceased children and had "never adopted any children or cared for any children . . . other than the natural children named above." 45

Annabel Boutwell never filed suit to establish the paternity of Prince Ricker to Appellant during his lifetime. Eight years elapsed from the time of Appellant's birth and her adoption by Jerry Barker; however, no voluntary or involuntary proceedings were initiated to establish paternity. The suit of the stablish paternity.

SUMMARY OF ARGUMENT

1. This appeal has been improvidently granted and must be dismissed. The conclusions established, *infra* demon-

^{36.} D.Ex. 18, R. 810; R. 410-411.

^{37.} D.Ex. 33, 34, R. 822, 828.

^{38.} D.Ex. 34, R. 822-828.

^{39.} R. 742-747. R. 749-756.

^{40.} R. 90-91, 757-760. 41. R. 138-141, 150.

^{42.} R. 372, 377.

^{43.} P.Ex. 7, R. 416, 432; R. 409, 426-427.

^{44.} R. 474.

^{45.} D.Ex. 16, R. 807.

^{46.} R. 83-89, 97-98. 47. R. 97-98.

strate that Appellant has no standing. It is further established that to actually grant the relief she seeks would require this court to overturn the findings of the state court, which is not within the power of this tribunal to do under the intermediate scrutiny standard. Further reflection establishes that adjudication on the merits would be an advisory opinion, since the Texas Probate Code already complies with *Trimble*.

Appellant is fully sensitive to the Court's concerns in this area of adjudicating the constitutional rights of illegitimate children. In consideration of those concerns, it is most respectfully argued that this case is "an unwise vehicle for exercising the 'gravest and most delicate' function that this Court is called upon to perform[.]" New York v. Uplinger, — U.S. —, 104 S.Ct. —, 81 L.Ed.2d 201, 206 (1984) (Stevens, J., concurring).

2. Assuming that this court decides to entertain the merits of this claim, Trimble v. Gordon, 430 U.S. 762 (1977) should not be applied retroactively. As argued, there are nine factors that render this case outside the ambit of any decided by this Court. In each of this Court's previous adjudications on the rights of illegitimates, there was evidence to believe there was a familiar relationship between the illegitimate child and the father. Here, the evidence is to the contrary.

A canvassing of this Court's opinions shows solid evidence of paternity that is lacking in this case. See e.g., Lalli v. Lalli, 439 U.S. 259 (1978); Gomez v. Perez, 409 U.S. 535, 536 (1972) (per curiam); Caban v. Mohammed, 441 U.S. 380 (1978); Parham v. Hughes, 441 U.S. 347, 349 (1978); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1971); United States v. Clark, 445 U.S. 23 (1979); and Mathews v. Lucas, 427 U.S. 495, 497 (1975).

In almost every case in which this Court has adjudicated the rights of illegitimate children under the Equal Protection Clause there was clear and convincing proof of paternity, both de facto and de jure. Labine v. Vincent, 401 U.S. 532, 533 (1971), that being the opposite of the case in chief.

ARGUMENT

I

APPELLANT'S ACTION SHOULD BE DISMISSED BECAUSE THE APPEAL WAS IMPROVIDENTLY GRANTED.

A. APPELLANT LAC S STANDING TO ASSERT THE RIGHTS OF THIRD PARTIES.

With all due respect, Appellant has no standing to assert the many and varied claims combined under the equal protection clause of the Fourteenth Amendment which she continues to press before this Court.

Appellant does not claim that the construction of state law or finding of fact in the present case by the state court impacts upon her because she is female, or a member of any other suspect classification. Any illegitimate child in circumstances like the Appellant would be treated in exactly the same fashion, regardless of race, gender, religion, or other factor.

It is only because of the gender of her purported parent that Appellant claims injury. It is argued by the Appellant, that the gender of her putative parent prevents her from inheriting. Indeed, Appellant argues:

In every brief and motion for rehearing filed . . . she has raised the Fourteenth Amendment issue [] presented here . . . (3) that the denial of heirship discriminated invidiously based on the sex of her deceased parent. (Jurisdictional Statement of Appellant, pp. 11-12).

^{48.} See also Appellant's Jurisdictional Statement at p. ii, under "SEXUAL CLASSIFICATION QUESTIONS,

⁽⁵⁾ Where maternal heirship requires only a preponderance of the evidence, while paternal heirship is not allowed [sic], is this distinction permissible?"

See also Appellant's Jurisdictional Statement, at p.13, where in affirming the trial court, the appellate court "did not directly address the validity of the sexual basis of the statutory classification." (referring to Reed v. Campbell, 682 S.W.2d 697 (Tex. App. 1984, writ ref'd n.r.e.). See also, Appellant's Jurisdictional Statement, at p.14, "The third part [of this section] discusses the substance of the blanket denial of heirship based on the sex of the decedent."

As is evident, Appellant's entire claim is based upon a gender-based differentiation impacting upon her parent(s), not directly herself.

Since it is the gender of the parent at issue that controls the outcome of this case, it is in fact the parent who is directly impacted upon by the sex-based differentiation enacted by the Texas Legislature.

Under the present facts, it would be impossible for the father to raise this cause of action (the situation arises only upon his death, intestate), therefore Appellant assumes that she, as the purported illegitimate child of a father who died intestate, is the one to challenge the Texas statute.

However, it is clear that if such a claim is to be prosecuted,⁴⁹ the proper representative in his stead is not his illegitimate child, but the administratrix of his estate. The representative of his estate, into which devolved his rights and obligations upon his death, is the proper person to press his rights in his stead. The illegitimate child is not the proper representative of his interests.

Since the reality is, and Appellant concedes, that this appeal is governed by the impact of a gender based classification upon a third party, her parent, she has no standing to prosecute this appeal. Warth v. Seldin, 422 U.S. 490, 499 (1975): "[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Since it is evident Appellant bases her claim on the right or interest of a third party, and is not the proper representative of that party, this appeal should be dismissed based upon the principles of Warth.

Appellant also presses her claim based upon the alleged injury inflicted upon her mother by the Texas inheritance practices then in effect.

The sexually discriminatory aspect of the classifications applied to defeat Delynda's heirship is a second and independent reason that they are repugnant to the Fourteenth Amendment. The bastardy classifications imposed on Delynda's heirship are subject to a gender-based subclassification. Surviving mothers of illegitimate children are disadvantaged by the continuing denial of paternal inheritance to an illegitimate child, while full maternal inheritance rights have been allowed. This limitation on illegitimacy disinheritance gives a surviving father the benefit of the mother's estate when discharging his duty to support his non-marital child. Based solely on her sex, the statute continues to deny a surviving mother this benefit. (Brief of Appellant, pp. 17-18).

Appellant's natural mother, Annabel Boutwell Barker is alive and well at the time of this appeal. Appellant has not alleged,⁵⁰ much less proven, that this claimed discrimination against her mother has injured her. It is beyond dispute that Appellant has no standing to appeal the judgment of the court below based upon this contention. See Warth v. Seldin, supra at 499. Heald v. District of Columbia, 259 U.S. 114 (1921) is also instructive:

It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show he is within the class of persons

^{49.} Indeed, Appellant herself acknowledges that the estate of the man whom she claims is her father is the proper representative of his interests. "[N]otice has been given his estate in the present action." (Appellant's Brief on the Merits, p. 88).

^{50.} Appellant claims, "Delynda has standing to urge the point because she has been harmed directly by the sex based discrimination inherent in the 1956 enactment of § 42 of the Texas Probate Code, and she has asserted invidious sex discrimination at every level of appeal in the state courts." (Appellant's Brief on the Merits, p.67). It is submitted that declarations of "discrimination" asserted at whatever level are an irrelevancy in a determination of whether Appellant has standing before this Court. It is obvious Appellant is confusing standing with preservation. It is further obvious that since Appellant has demonstrated no injury of any kind from the discrimination that she claims is directed against mothers of illegitimates, and fails to allege that she is a member of the class, she has no standing to press the point here. Appellant cannot substantiate the claim that she has been "harmed directly."

[&]quot;It is the responsibility of the complainant to clearly allege facts demonstrating that he is the proper party to invoke judicial resolution of the dispute and exercise of the court's remedial powers." Warth v. Seldin, supra, at 517-518.

with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. Id. at 123.

(Mr. Justice Brandeis, speaking for the unanimous Court).

Accord, Supervisors v. Stanley, 105 U.S. 305, 311 (1881): Hatch v. Reardon, 204 U.S. 152, 160 (1906); Citizens National Bank v. Kentucky, 217 U.S. 443, 453 (1909); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544 (1914): Thomas Cusack Co. v. Chicago, 242 U.S. 526, 530 (1916); Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 149 (1918); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Gladstone Realators v. Village of Bellwood, 441 U.S. 91, 99 (1979); Coleman v. Miller, 307 U.S. 433, 464 (1938); Bailey v. Patterson, 369 U.S. 31, 32-33 (1961); and Schlesinger v. Reservists to Stop the Way, 418 U.S. 208, 216 (1974).

Appellant's claim as to the impact on mothers of illegitimates is at most a generalized complaint. Flast v. Cohen, 392 U.S. 83 (1968); Fairchild v. Hughes, 258 U.S. 126 (1921); Frothingham v. Mellon, 262 U.S. 447 (1922). Appellant demonstrates no injury, and is not within the class whose rights she seeks to assert. As such, she lacks that "personal stake in the outcome of the controversy [so] as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr. 369 U.S. 186, 204 (1962). Accord, O'Shea v. Littleton, 414 U.S. 488, 494 (1974); and Rakas v. Illinois, 439 U.S. 128, 132 (1978) n. 2.

Appellant in neither her Jurisdictional Statement nor her brief has demonstrated why she should be allowed to press the interests of her late, alleged father and live mother, therefore, this appeal should be dismissed as improvidently granted.

Warth is especially pertinent in the present case because the assertion of third party rights and the rights of others not a party to this action are inextricably interwoven throughout the fabric of Appellant's brief.⁵¹

For the same reasons, Appellant's attack on the "dateof-filing" test as "over inclusive" (Brief of Appellant at pp.25-27) must be dismissed for lack of standing. Appellant not having alleged how "over-inclusiveness" has impacted upon her, nor having alleged that she is in the class so affected, it is clear that this attack must be dismissed. As an additional and independent ground for dismissal of this argument is that whatever the validity, vel non, of Appellant's conclusion that "The 'time of filing' test actually jeopardizes orderly probate procedure and settlement of titles" (Id. at 26) this is purely a local administrative concern, best handled by the Texas courts.

B. ADJUDICATION ON THE MERITS WOULD RE-QUIRE THIS COURT TO OVERTURN FINDINGS OF FACT BY THE STATE COURT, WHICH FIND INGS ARE AMPLY SUPPORTED BY THE RECORD.

It must be stressed that the entire argument of Appellant before this Court flows from the posited assertion that the evidence of Prince Ricker's paternity of Delynda Ann Ricker Barker Reed was "clear and convincing."52

"convincing": p.97 "clear and convincing."

^{51.} E.g., Brief of Appellant, at p.69: "The importance of the state's objectives in probate—prevention of spurious claims and providing for orderly devolution of property is not in dispute. The § 42 discrimination against women, however, is not substantially related to achieving these objectives"; at p.71: "In Trimble v. Gordon, supra, proof problems were held to be insufficient justification for discrimination based on illegitimacy. The same problems cannot justify discrimination against certain classes of women—in this case, surviving mothers of illegitimates"; at p.14: "The lower court did not address Delynda's claim that the Texas probate statutes discriminate against mothers who face the intestate death of the fathers of their illegitimate children.'

^{52.} Appellant's Jurisdictional Statement, p. 6, n.1. This erroneout characterization is reasserted in various places within Appellant's Brief: e.g., p.7, n.1, paternity "conclusively established"; p.70, "paternity has been favorably adjudicated"; p.75 "cogent proof", p.86, "clear and convincing"; p.93, "convincing"; p.96,

This assertion is apparently predicated primarily upon the opinion of Prince Ricker's sister that the Appellant is a "perfect cross between her mother and Prince." Appellant's Jurisdictional Statement at p.6, n.1. (Hereinafter "Jurisdictional Statement"). Appellant attempts to buttress this purportedly "clear and convincing" evidence by recourse to "comparison of pictures." (Id.) These photographs, taken at times unknown, and of unknown clarity and quality, unsupplied in the record, constitute the second prong of Appellant's assertion that paternity was established by "clear and convincing" evidence.

This conclusion is in contradiction of the findings of fact by the Texas courts. The state Court of Appeals in affirming the take-nothing judgment rendered against Appellant in the state District Court, specifically held,

Prince Ricker was a chronic alcoholic with associated mental problems and was judicially declared non compos mentis in July, 1968. * * * The plaintiff [argues she was] entitled to inherit from [Prince Ricker] since the evidence conclusively established as a matter of law that the father recognized her as his child. To the extent that this point presents the argument that the evidence conclusively established that the father recognized the Plaintiff as his child, it will be overruled since the evidence was hotly contested on this issue. The instances of recognition by the father of the child are opposed in the main by the strong evidence of the deteriorated mental condition of the father during each occurrence as well as positive occurrences of nonrecognition. *Id.* at 698-699.

It is suggested that for Appellant to succeed, it will be necessary for this Court to overturn the clear and unambiguous finding on the crucial point of paternity by the Texas courts. Reed v. Campbell, supra.

Appellant's present recitation of "clear and convincing evidence" (Jurisdictional Statement, p.6, n.1) has been specifically reviewed and rejected by the Texas courts. For example, Appellant claims that "when he married Delynda's mother [Annabel Boutwell] Prince Ricker agreed that they would be husband and wife." Id. The state court specifically found,

Annabel Boutwell testifies she and Ricker were ceremoniously married in Juarez, but she did not know any of the witnesses present and claims she lost the marriage certificate evidencing the alleged marriage. . . . [T]wo certificates of non-existence of records from Mexico [] showed that the civil registries showed no marriage of Prince Ricker and Annabel Boutwell from January, 1957 to December, 1959, in the Mexican registries. 682 S.W.2d 697, 700. The jury failed to find that Boutwell and Ricker did hold themselves out to the public as husband and wife until June, 1958. Id. at 699.

Appellant further claims that "After Prince Ricker's ceremonial marriage he moved his personal things [but not himself] into the house which Delynda's mother shared with her mother in Big Spring." Id.

The state court specifically found:

[A] teaching associate of Ricker's testified that a search of school records did not reflect whether Ricker was or was not married. He testified that he was under the impression that Ricker was single because he never mentioned a family. *Id.* at 701.

Appellant further claims that "The couple were listed together at that address [Big Springs] in the city directory." *Id.* The state court found:

Annabel Boutwell testified that from the time of the purported marriage until she and Prince Ricker ended their relationship in 1958, she continued to live with her mother in Big Springs and Ricker kept his residence in Stanton, Texas[.] *Id.* at 700-701.

Appellant claims further that "Delynda's mother testified at the trial that she had sexual relations only with Prince Ricker from their wedding until after Delynda was born." Id. The state court found:

Annabel Boutwell never filed suit for child support nor did she ever attempt to establish the paternity of Prince Ricker during his lifetime. *Id.* at 701.

Appellant claims, "Prince Ricker sometimes admitted only that he *could* have been Delynda's father. At other times throughout his life he confided that he was the father." *Id.* (emphasis added). The state court found,

The instances of recognition by the father of the child are opposed in the main by the strong evidence of the deteriorated mental condition of the father during each occurrence as well as positive occurrences of non-recognition. *Id.* at 699.

[See also Davis v. Jones, 626 S.W.2d 303, 304 (Tex. 1982).]

Appellant maintains that, "[A]n alcoholic, [Prince] wrote in his A.A. work, that he was the father, reasonably sure, of a child born out of wedlock." *Id.* (emphasis added).

Appellant claims, "He [Prince] explained to his sister that this ["A.A. work"] meant Delynda." Id. [See Davis v. Jones, supra, rejecting as insufficient an oral social introduction by the father of a child as "my daughter" to a third person.]

Appellant claims that "the evidentiary basis of the finding of paternity was not attacked by Appellees in any of the state courts." Id. However, as is evident, the "evidentiary basis of paternity" was vigorously advanced to the Texas courts by Appellant on appeal, and was soundly rejected by the state court. With the determinative holding of the court in Reed v. Campbell decisively rejecting the claim of paternity, exactly where and in what circumstances would Appellant have Appellee "attack" this "clear and convincing" evidence of paternity?

Findings of fact by a state court are entitled to presumptive validity, especially when amply supported by the record, as is the case here. See Townsend v. Sain, 372 U.S. 293, 313, 318 (1962). Accord, Wainwright v. Witt. 53 469

U.S. —, 105 S.Ct. 844, 83 L.Ed.2d 841, 854 (1985), "[This Court has] emphasized that state-court findings of fact are to be accorded the presumption of correctness."); United Gas Co. v. Texas, 303 U.S. 123, 143 (1937) "This Court will review the findings of fact by a state court . . . where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it[.] (emphasis added).

It is submitted that since the findings discussed herein are dispositive, are presumptively valid, and are not questioned by Appellant, this Court cannot sua sponte come to different factual conclusions. The standard of review here is not de novo. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) strongly counsels against granting the unique relief Appellant seeks from this Court. Kremer is of primary interest in its treatment of 28 U.S.C. § 1738.

Noting that, "As one of its first acts, Congress directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts." *Kremer continued,

Accordingly, the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts. Allen v. McCurry, 449 U.S. 90, 96 (1980); Montana v. United States, 440 U.S. 147 (1979); Angel v. Bullington, 330 U.S. 183 (1947). Indeed, from Cromwell v. County of Sac, 94 U.S. 351 (1877) to Federated Department Stores v. Moitie, 452 U.S. 394 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in ful-

^{53.} Both Townsend and Wainwright v. Witt were concerned with habeas actions by state prisoners. As such, their presump(Continued on following page)

⁽Continued from previous page)

tion of validity of state court findings of fact is especially telling in the case *sub judice*. For whatever the rather imprecisely drawn parameters of the intermediate level of scrutiny with which this Court reviews the claims of illegitimates may be (*Trimble*, supra at 767) it is submitted that this scrutiny does not even approach that of habeas action.

^{54.} Act of May 26, 1790, Ch. 11, 1 Stat. 122, 28 U.S.C. § 1738 cited in Kremer v. Chemical Construction Corp., supra, at 463.

filling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Comity will be well served by this Court's dismissal of this appeal or affirmance of the state court's traditional duty as reviewer of matters of state interest. For this court to adopt Appellant's position and retroactively apply Trimble through Chevron (See point IV infra) Appellant will still not inherit. Since the no-paternity issue with reference to inheritance has been resolved, Appellant cannot relitigate it between herself and the estate.

C. ADJUDICATION ON THE MERITS WOULD RE-QUIRE THIS COURT TO FORMULATE ITS OWN CONSTRUCTION OF STATE LAW, THUS DOING VIOLENCE TO THE CONCEPT OF FEDERAL-STATE COMITY.

To grant the relief requested, this Court's formulation of state law would be at variance with that of the Texas courts.

If this Court were to ignore the conclusion of the Texas appellate court in *Reed v. Campbell, supra* at 698-699, and find that the Texas court incorrectly analyzed the facts before it, then it is submitted that there is only one other thing those findings could be, and that is a construction of state law.

If it be assumed that the critical determination of lack of paternity on Prince Ricker's part is not a finding of fact, but a construction of state law, then the end result is the same. Assuming, arguendo, that the passage is a conclusion that is reached by an application of state law, then the compelling conclusion must be that based upon historic state-federal respect, the construction in question has been entrusted to the state courts.

The applicable evidentiary standard as applied by Reed is to be found in Davis v. Jones, supra. It is im-

portant to note that Appellant makes no attack of any kind on the evidentiary formulation of the Texas courts.

As the Supreme Court of Texas in *Davis* observed in its canvassing of this Court's applicable decisions:

[I]t must be noted that in each⁵⁵ of the cases by the Supreme Court there was strong evidence of paternity; a court decree that the "father" support the child, the signing of a birth certificate and the furnishing of support, the formal consent of "my son" to marry, the formal acknowledgment of the child for purposes of support, and the like. As to [the parties in Davis] there are only some oral statements to a third party and letters . . . in which Warren Davis Sr. recognized Kathryn and Craig as his daughter and his grandson respectively. *Id.* at 309.

However, even if this court were to decide the present case, it is argued that the evidentiary findings and construction of state law in *Reed v. Campbell* cannot be disturbed. Unless this court is prepared to rewrite Texas law on the subject of rules of evidence, the evidentiary standard gleaned from *Davis* is clear, Appellant is unable to prove her case.

The Texas appellate court has already decisively rejected the finding of paternity. The Texas Supreme Court has rejected as insufficient for evidentiary purposes and oral statements indicating paternity to a third party and written letters acknowledging paternity, 56 as well as a photograph showing the putative father and his alleged daughter in the same print. 57

Furthermore, the Texas statutes of which Appellant complains were overhauled in light of Trimble and are in

^{55.} Trimble v. Gordon, supra (1977), Labine v. Vincent, supra (1971) and Lalli v. Lalli, supra (1978).

^{56.} Which presumably could be authenticated by a handwriting expert, as opposed to "comparison" of photographs on which Appellant relies. See Appellant's Jurisdictional Statement, p.6, n.1. A photograph showing the claimed father and illegitimate daughter in the same shot was found unavailing in Davis, 626 S.W.2d 303, 304. The holographs at issue in Davis were without signature. *Id.*57. Supra note 8.

full compliance with that decision. The evidentiary standard of Texas used to establish paternity—not under attack here—is reasonable under *Lalli*. And that standard precludes the relief Appellant seeks.

It cannot be doubted that a construction of state law not in violation of federal constitutional provisions is without the jurisdiction of this Court. *United Gas Co. v. Texas*, supra at 139:

It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedures actually adopted satisfied all state requirements.

Accord, Hall v. DeCuir, 95 U.S. 485, 487 (1877). See also John v. Paulin, 231 U.S. 583, 585 (1913); Lee v. Central of Georgia Ry Co., 252 U.S. 109, 110 (1920); Central Union Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925); Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 362, 363 (1932) (Cardozo, J.); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 104 (1944); Dixon v. Duffy, 344 U.S. 143, 144 (1952).

Appellant having made no complaint as to the manner in which the Texas courts reached the critical evidentiary findings, it is clear that for this Court to adjudicate on the merits, it will be necessary to sua sponte overturn those findings.

Further, for this Court to actually grant the relief sought,⁵⁸ it will have to re-weigh the evidence and construct

its own evidentiary standard. If the Court were to take this action, it would be, in essence creating an independent federal common law regarding evidence, impermissible under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).⁵⁹

II

THE PRESENT APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

Due to the independent evidentiary conclusion of the Texas appellate court, an adequate independent state ground exists to support the judgment. See Wainwright v. Sykes, 433 U.S. 72, 81 (1976). Accord, Dixon v. Duffy, supra at 146. "If the state judgment was based on an adequate state ground, the court, of course, would be without jurisdiction to pass upon the federal question." Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. Memphis. 20 Wall. 590 (1875); Avery v. Milland County, 390 U.S. 474, 486 (1967) (Harlan, J., dissenting); Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1964); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1944); Harris v. Zion Savings Bank and Trust Co., 313 U.S. 541 (1940).

This conclusion is especially compelling here in view of the extraordinary limited impact the Court's adjudication of this case would have. It is important to note that the situation at bar is incapable of repetition.

Appellant would argue that great numbers of illegitimate children are impacted upon by the probate practices she attacks. However, as becomes clear from an examination of Appellant's Brief, this simply is not the case.

(Continued on following page)

^{58.} Appellant asks this Court, inter alia, to remand directly to the Texas trial court, by-passing the state court of appeals from whence this judgment comes. In so doing, Appellant asks this Court to enter a Mandate ordering the trial court to "Declar[e] that Delynda is the legitimate child of her natural father, Prince Rupert Ricker, pursuant to Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§ 37.005 and 37.003." (Appellant's Brief on the Merits, pp.99-100). See also Appellant's request that this Court order the trial court to award attorney's fees as provided for under Texas law "and by the Fourteenth Amendment as the equivalent of the fees provided by Family Code § 13.42(b)." (Id. at 100-101). It is submitted that Appellant misperceives the role and function of this Court as the ultimate arbiter of the United States Constitution.

^{59.} See also Larson v. Valente, 456 U.S. 228, 267, n.4 (1981): "[This Court should not] venture[] into a realm of state evidentiary law in which it has no competence and no business." (Rehnquist, J., dissenting).

^{60.} E.g., Brief of Appellant, at p.42: "After Labine it was less clear than before that illegitimate children and women would continue to be regarded as 'persons' within the meaning of the Fourteenth Amendment, at least in matters touching on family, property, and probate rights."; at p.63. "The purpose of Trimble is to allow nonmarital children an equal opportunity to share in

The present case involves a class of one. The Appellant. Under Appellant's own formulation, relief would be afforded only to those illegitimates impacted upon by the date of filing test, post-Trimble. The 1977 and 1979 amendments to § 42 of the Texas Probate Code have completely eradicated the situation of which Appellant complains. Therefore, the only illegitimates who could possibly be affected are those who have not fallen under the 21-year extension of Texas Family Code § 13.01, whose fathers died before Trimble, but whose inheritance was denied based on the date-of-filing test, and where the estate is still open to this day.

Appellant in point of fact, did not fall within the time constraints for legitimation prescribed by the Texas Legislature. That she should be so impacted is no reason to burden this Court with the task of what is, in substance, the minute adjustment and administration of the timing of certain Texas probate statutes. $Se\epsilon$ Appellant's Request for Relief at pp.99-101.

That the tolling of the statute of limitations is the actual source of Appellant's complaint is obvious from her Jurisdictional Statement. At the trial level in the Texas courts,

Appellees filed a motion for summary judgment that Delynda should not inherit because she had not been legitimated by a valid marriage of her parents or under the statutory procedures of the Family Code. They pointed out that Delynda's claim for legitimation under the family code was barred by limitations. Delynda responded that issues were raised as to whether

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their father's estate; this can hardly be outweighed by Appellee's desire to profit from the inequitable treatment which has historically been visited on illegitimates." at p.64. "The exclusion of nonmarital children from the rights granted children generally falls more heavily on them than the recognition of their rights would fall on others." at p.73. "The rights and benefits conferred on some illegitimates by Chapter 13 [Texas Family Code] are wholly denied to Delynda's class of illegitimates, who were born prior to its effective dates."

she was her father's child, whether she was illegitimate and whether suit to establish paternity had been filed in time. * * * Appellees moved for judgment on two grounds (1) that Trimble v. Gordon had not been applied retroactively where the death was before Trimble was handed down and the claim for heirship was filed afterward; and (2) that Delynda could not inherit without being legitimated, and that limitations barred her legitimation. The trial court overruled Delynda's motion, and entered judgment for Appellees without opinion. (Jurisdictional Statement, pp. 10-11, emphasis added).

This case necessitates no ambitious analysis as to whether *Trimble* should be applied retroactively; all that is needed is a determination of whether the Texas limitations statute is reasonable under *Lalli* and *Mills*, *infra*.

The only question at issue in this case is the reasonableness of the Texas limitations statute.

The mischiefs that this Court proscribed in *Trimble* were taken full heed of, and corrected by the Texas legislature.

The Texas Legislature was in session in 1977 when the Supreme Court handed down Trimble[.] The Legislature, in 1977, amended § 42 of our Probate Code to provide for alternative methods of making children legitimate. * * * The 1977 Texas statute was enacted after Trimble and, presumably, in the light of its 'teachings. $Davis\ v.\ Jones,\ 626\ S.W.2d\ 303,\ 305,\ 308\ (Tex.\ 1982).$

In response to *Trimble*, Texas liberalized its Probate Code. Under the pre-*Trimble* version, an illegitimate could inherit from the father only by subsequent marriage of the parents, even if that marriage was null in the law.⁶¹ The post-*Trimble* 1977 version permits paternal inheritance on the part of an illegitimate not only by marriage of the parents, but also through voluntary legitimation

^{61.} Tex. Prob. Code § 42 (1955 version). See arguments III & IV infra.

proceedings under Chapter 13 of the Texas Family Code.⁶² The 1979 version of the Code provides for identical inheritance rights, maternal and paternal, to be applied to illegitimates.⁶³

Texas already treats illegitimate inheritees, whether from the father or the mother, exactly alike by statute. Texas has, on its own initiative, after the *Trimble* holding, altered its pre-1977 practices. Any decision by this Court to retroactively apply *Trimble* will have no impact on the laws and practices of Texas in this area, since the state already provides what *Trimble* commands.

It is well settled that this Court will not entertain a case that lacks a substantial federal question. California Water Service Co. v. City of Redding, 304 U.S. 252 (1938). Accord, Fenwick v. Meyers, 275 U.S. 485 (1927) (per curiam); Stimson v. City of Los Angeles, 264 U.S. 569 (1923) (per curiam), and will dismiss an appeal filed from a state court as improvidently granted if examination reveals no substantial federal question. Gaines v. Washington, 277 U.S. 81 (1928); Miller v. California, 418 U.S.

915 (1974) ("Miller II"); Kraft, Inc. v. Florida Department of Citrus, 456 U.S. 1002 (1982).

The test of whether a case lacks a substantial federal question was stated in *California Water Service Co. v. City of Redding, supra* at 255. "The lack of substantiality in a federal question may appear either because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." (cite omitted)

The test was further amplified in *Hagans v. Levine*, 415 U.S. 528, 536-537 (1973):

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and insubstantial as to be absolutely devoid of merit," . . . "wholly insubstantial," . . . "plainly unsubstantial" . . . or "no longer open to discussion." (cites omitted)

Thus, the instant appeal should be dismissed under either prong of the insubstantiality test. Considering the test in serriatim, the following conclusions become clear.

Appellant's claim is wholly without merit in the instant action, because Appellant has not demonstrated in the slightest the impropriety of the holding of no-paternity in Reed v. Campbell, supra. Though Appellant attacks Reed for its "time of filing" test, no complaint is heard over the no-paternity conclusion.⁶⁴

^{62.} Tex. Prob. Code § 42 (as amended in 1977). Illegitimate children could inherit from the father, but not the father's relatives, and vice versa. The Legislative History of the revision reveals: Background Information: The intent of the Family Code revisions dealing with legitimation of the children was to equalize the status of legitimated children and legitimate children. Because of oversight, however, inheritance rights under the Probate Code were not amended to equalize the rights of the two groups of children. Since illegitimate children who have been legitimated have the same status as legitimate children for other purposes, it is inequitable to deny the legitimated child equal inheritance rights (as cited in *Davis*, *supra*, 626 S.W.2d 303, 305, n.2).

^{63.} Tex. Prob. Code § 42(a), (b) (As amended in 1979). The inequity recognized in n.23 and in the text was fully corrected, illegitimate children in Texas now having identical inheritance rights. For an illegitimate child to become the inheritable child of the father, the parents must intermarry, the father must acknowledge the child as provided for in Ch. 13 of the Texas Family Code, or the relationship can be established by court decree. Significantly for purposes of acknowledgement, Texas recognizes and will accept not only its own method, but "a like statement in another jurisdiction." Davis, Id. at n.5.

^{64.} The closest thing to an "attack" that Appellant makes on Reed's no-paternity conclusion is to be found at pp. 97-98 of Appellant's Brief on the Merits where she conclusively asserts, "Delynda proved her relationship to her father by clear and convincing evidence[.]" Appellant makes no due process claim as to the standards utilized or methods in Reed to reach the no-paternity holding. Not having done so, she has instead based her entire brief to this Court on her own perception as to the weight of the evidence. The most that can fairly be said is that Appellant does not agree with the evidentiary conclusion of the Texas courts. Mere displeasure with the evidentiary conclusion of a state court, absent any claim that the state court reached that conclusion in a way that deprived Appellant of due process, is an insufficient basis for appeal to this Court.

If this Court were to do exactly what Appellant wants, namely retroactively apply *Trimble* through *Chevron*, the result of this Court's holding would still not permit inheritance. This is so because the determinative holding of no-paternity from *Reed* would preclude Appellant from inheriting from an estate in which it has been judicially determined that there is no familial relationship between Appellant and decedent.

The instant appeal is equally infirm under the second prong of the insubstantiality test. This is clear in consideration of two factors. One being the method by which Texas provides for acknowledgement of illegitimate, the second being the 21-year extension of the statute of limitations governing such legitimation.

As to the method for legitimation, this Court noted in Gomez v. Perez, supra at 538,

We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

The "barrier" that Texas has erected is in no way "impenetrable" and is clearly reasonable under prior decisions of this Court. Texas provides a number of mechanisms whereby an illegitimate child, such as Appellant would be rendered inheritable. It must be stressed that these mechanisms are all alternatives, they are not cumulative. That is, satisfaction of any one of the criteria renders the illegitimate child inheritable—it is not necessary to satisfy all categories on the list.

First. An illegitimate child, such as Appellant, could have been rendered inheritable by a subsequent marriage of the parents, even if that marriage was a nullity in the law.⁶⁵ In Appellant's case, the state court specifically

found no marriage. Nonetheless, Appellant still avers to this Court that "clear and convincing" evidence of Prince Ricker's paternity can be seen from "the invalid marriage of her parents." Brief of Appellant at p.98.

The fact that no marriage was found in what precludes Appellant from inheriting.

There is nothing in the jurisprudence of this Court to even hint that a subsequent invalid marriage of the parents is in any way an improper vehicle to provide for inheritability of the children. This is especially so in light of the fact that a subsequent marriage is not the sole means to do so, and Texas provides a method of recognition of a child as legitimate although the marriage is a legal nullity. Tex. Fam. Code Ann. § 12.02(b). This recognition sets the Texas practice apart from the Louisiana method proscribed in Weber v. Aetna Casualty & Surety Co., supra. In Weber, this Court found critical that it was a legal impossibility for the father to acknowledge the illegitimate children. Id. at 171.

The fact that intermarriage of the parents is *not* a necessity to render the child inheritable renders the Texas practice fully in accord with *Lalli v. Lalli, supra* at 266-267. The marital status of the parents is wholly irrelevant, since Texas will even recognize the issue of a marriage null in the law.

Second. Illegitimate children in Texas can be rendered inheritable by Voluntary Legitimation under Ch. 13, Texas Family Code. In Parham v. Hughes, supra this Court sanctioned Georgia's legitimation procedure. The Georgia procedure was significantly less generous than the Texas practice at issue here, since Georgia, unlike Texas, made no provision for acceptance of out-of-state paternity acknowledgment events.

In Lalli, this Court sanctioned the New York practice, which mandated that paternity could be established

^{65.} Tex. Prob. Code § 42 (1977). It will be demonstrated how Appellant would have been eligible for all of these remedies under the 21-year extension of the limitations statute. It will be further demonstrated that the bad luck of Appellant in not falling (Continued on following page)

⁽Continued from previous page) within the ameliorative extension is no ground to attack the limitations statute as irrational or not closely attuned to promote a legitimate state interest.

by judicial decree only during the lifetime of the alleged father. Lalli v. Lalli, supra at 263.

Third. Texas provides that the issue of inheritable paternity can be established by court decree, in full compliance with the holdings of Lalli and Parham.

It cannot be emphasized enough that satisfaction of any of the above renders an illegitimate inheritable under Texas law. Each of the alternative methods under Texas law to render an illegitimate child susceptible of inheriting is clearly and unquestionably constitutional under decisions of this Court.

Thus, Appellant is only left with the option of attacking the 21-year extension of the limitations statute Texas enacted to enable illegitimates to avail themselves of the above options. 66 Because Appellant unluckily did not fall within the time span of the generous ameliorative statute, she attacks it.

In clear recognition of this Court's holdings in Mills v. Habluetzel, 456 U.S. 91 (1981) and Pickett v. Brown, 462 U.S. 1 (1983), Texas extended the limitations statute during which period illegitimates can avail themselves of the mechanisms to render themselves susceptible of inheritance.

As is evident, this Court's holdings and separate opinions in *Mills*, *infra*, and *Pickett*, *infra*, the Texas Legislature drafted the limitations extension with these cases in mind.

In Mills, this Court struck down as unconstitutional Texas' one year statute of limitations in which paternity proceedings must be brought. Mills v. Habluetzel, supra at 101. Finding the one-year limitations period to be so truncated that it did not provide a meaningful period in which to establish paternity, this Court noted, "[T]he period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf." Id. at 99.

Justice O'Connor, concurring separately, wrote "separately because I fear that the opinion may be misinterpreted as approving the 4-year statute of limitation" (*Id.*) that Texas then used to govern paternity actions.

Justice O'Connor, expressing a view held by a majority of this Court stressed,

It is also significant to the result today that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff. Of all the difficult proof problems that may arise in civil actions generally, paternity, an issue unique to illegitimate children, is singled out for special treatment. When this observation is coupled with the Texas Legislature's efforts to deny illegitimate children any significant opportunity to prove paternity and thus obtain child support, it is fair to question whether the burden placed on illegitimates is designed to advance permissible state interests.

Id. at 104-105 (footnote omitted)

In *Pickett v. Brown*, *supra*, this Court relied heavily on *Mills* to conclude that Tennessee's two year limitations period for paternity actions was unconstitutional. In so doing, the court in *Pickett* noted Justice O'Connor's *Mills* observation that "a paternity suit was one of the few Texas causes of action not tolled during the minority of the plaintiff."

Thus, in redrafting its paternity action limitations statute after Mills, the Texas Legislature faced this situation: First, the one year limitations period was held unconstitutional in Mills. Second, a two year limitations period was held unconstitutional in Pickett. Third, a ma-

^{66.} Tex. Fam. Code § 13.01 (1983) "Time Limitation of Suit. A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought on or before the second anniversary of the day the child becomes an adult, or the suit is barred."

Section 13.02 (1983) provides: "A cause of action that was barred before the effective date of this Act but would not have been barred by § 13.01, Family Code, as amended by this Act, is not barred until the period of limitations provided by § 13.01, Family Code, as amended by this Act, has expired.

jority of the Court in Mills through Justice O'Connor's concurrence, had expressed the view that a four year statute of limitations would likely to be found unconstitutional. Fourth, a majority of the court in Mills, through the concurrence of Justice O'Connor, observed that it was a "fair question" whether a paternity limitations statute that expired during the minority of the plaintiff "Advance[d] permissible state interests." Fifth, this concern was treated with approval by the unanimous court in Pickett.

Texas redrafted its paternity limitations statute so that it terminated only after the illegitimate child reached the age of majority. The state provided that the limitations statute would not expire until "the second anniversary of the day the child becomes an adult." Tex. Fam. Code § 13.01 (1983).

Texas paid close heed to the decisions of this Court, and drafted a statute of limitations that is constitutional under *Mills* and *Pickett*. This being the case, Appellant has been relegated to the position of attacking the 21 year extension of the limitations statute because it does not "bear a substantial relation to the state interest of avoiding stale or fraudulent claims."

Because the State has placed itself in full compliance with *Mills* and *Pickett*, Appellant attacks the statute. The state is placed between Soylla and Charybdis due to its good faith efforts to obey the holdings of this Court.

However, as is obvious, since Appellant did not fall within the 21-year extension, the only way to placate Appellant would be if the Texas Legislature enacted a statute of limitations *longer* than 21 years, with Appellant specificially in mind, and terminating on a date one day beyond Appellant's birthday.⁶⁸

Exactly where would Appellant have the Texas Legislature draw the line? The act of drawing a line itself cannot be deemed unreasonable under the Fourteenth Amendment. When the question is debated as to where the cut-off point is to be established, Appellant has led us into the realm of open debate. And the Texas Legislature has acted reasonably in drawing the line where it did.

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." Avery v. Midland County, supra at 484. See also Lalli v. Lalli, sypra at 272-273. Accord, New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1978).

The issue being decisively settled by prior adjudications of this Court, it is respectfully submitted that there is no substantial federal question as to the limitations period governing this case. Every exercise in line drawing carries the risk that some will be excluded precisely because of where the line is drawn. This does not implicate equal protection if the cut-off point was fairly selected. All Appellant wants this Court to do is judicially extend the cut-off point beyond 21 years to cover her individual claim. Other than the fact that the Texas extension of its limitations statute did not cover her birthday, Appellant in no way has demonstrated that the point selected is not in full accord with *Mills* and *Pickett*. That being the case, this appeal should be dismissed for want of a substantial federal question.

III

ADJUDICATION ON THE MERITS WOULD CONSTITUTE ISSUANCE OF AN ADVISORY OPINION WHICH IS FORBIDDEN UNDER ARTICLE III TO THE UNITED STATES CONSTITUTION.

Adjudication on the merits in the present case would be a nullity because the Appellant has not attacked the inheritable paternity conclusion of *Reed v. Campbell, supra*. It is clear the point has been waived. Since the standard of

^{67.} Brief of Appellant at p. 74. See Mills v. Habluetzel, supra at 99-100: "[A]ny time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."

^{68.} Or, the Legislature might enact a special bill to make Appellant alone eligible. The equal protection problems with this approach are too obvious to require elaboration.

review is not de novo, this Court cannot sua sponte overturn the Reed holding. This is especially so in the light of the fact that the no paternity conclusion is supported by the record.

In this specific framework, which governs this case, any analysis and conclusion as to whether *Trimble* should be retroactively applied would constitute a decision akin to an advisory opinion because Appellant could not possibly profit from the holding. The *Reed* holding of no inheritable paternity would foreclose inheritance on the part of Appellant, even if *Trimble* were held to govern her case. Ability to benefit from the holding of this Court is an indispensable necessity in establishing the Court's jurisdiction. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

Thus, the question of whether *Trimble* applies retroactively would be an exercise in an "abstract, intellectual problem." *Coleman v. Miller, supra* at 460 (Frankfurter, J.). The Court would be issuing an opinion of which Appellant could gain no benefit, since the "no paternity" holding of *Reed* would still preclude inheritance. "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency." *Id.* at 462.69

Consideration of whether an advisory opinion would issue in this case starts with Mr. Justice Brandeis' seminal and oft cited Ashwander opinion. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring) Justice Brandeis provided a canvassing of seven salient factors under which constitutional adjudication by this Court would be improvident. Appellant's re-

70. Appellee recognizes, of course, that the opinion was rendered in the trenchant, immutable propositions advanced by Justice Brandeis are equally applicable when this Court is called upon to decide actions of State legislation.

quest for retroactive application of *Trimble* would be barred by four of the seven factors, namely:

- 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it"... "It is not the habit of the Court to decide questions of a Constitutional nature unless absolutely necessary to a decision of the case."
- 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."
- 4. The Court will not pass upon a constitutional question presented by the record, if there is also present some other ground upon which the case may be disposed.
- 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Ashwander v. Tennessee Valley Authority, supra at 346-348 (citations omitted).

Applying these factors in serriatim, the conclusion that the appeal was improvidently granted and constitutional adjudication is disfavored in this matter becomes evident.

An examination of factor two reveals that this Court would be deciding a question of constitutional import "in advance of the necessity of deciding it" if it is held that *Trimble* must be applied retroactively. This is shown by Texas' overhaul of its Probate Code, which now puts the Code in full compliance with *Trimble*. A holding that *Trimble* must apply retroactively to a state that already does what *Trimble* commands would be at most an affirmation or ratification of the act of the Texas Legislature. Retroactive application of *Trimble* in this case would have not the slightest impact on the Probate Code of Texas.⁷¹

^{69.} The Court is also asked to consider certain factors enumerated in the text, *supra*. Namely that this case, if decided on the merits, would apply solely to a class of one, and the fact that Texas has totally revamped the applicable portions of its Probate Code, and is already in full compliance with *Trimble*.

^{71. &}quot;It therefore becomes necessary to inquire what is meant by judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. 'Judicial power' says Mr. Justice Miller in his work on the Constitution, 'is the power of a (Continued on following page)

As to factor three, many of the same concerns apply. If the holding is properly no "broader than is required by the precise facts to which it is to be applied" then the sole beneficiary in the entire nation of the Court's work would be the Appellant. This is evident from Appellant's own admissions that the scope of this decision will be limited to those illegitimates whose alleged fathers died pre-Trimble, who have been impacted upon by a date of filing test, and where the estate is still open nearly a full decade after Trimble. Additionally it is a misnomer to characterize Appellant as the "beneficiary" of any Trimble holding, because the Reed "no inheritable paternity" conclusion would still prevent her from inheriting.

The impact of the Court's decision would be to hold invalid a section of the Texas Probate Code (§ 42, 1955 version) which the Texas Legislature has already abolished.

Under factor four, it is clear that a determination of whether *Trimble* should be retroactively applied through *Chevron* is unnecessary. This case can be decided completely by determining whether the Texas limitations statute is reasonable under *Mills*, *supra*. Thus, the case sub sidice "has some other ground upon which the case may be disposed of" without dealing with the *Trimble* retroactivity opinion.

Additionally, this appeal should be dismissed because "the judgement can be sustained on an independent state

(Continued from previous page)

ground."⁷² The ground being, as has been noted, a finding by the state court which is amply supported by the record, or a determination of evidentiary insufficiency reached through application of state law. See Mills v. Rogers, 457 U.S. 291, 305 (1981) and United States v. Hastings, 296 U.S. 188, 193 (1935).

Factor five relates to Appellant's lack of standing, which has been demonstrated, *supra*. Appellant's complaint is that she did not come within the operative time span of the ameliorative statute. This is no ground to complain of the statute's purpose or effect. This appeal was improvidently granted.

IV

NEITHER THE UNITED STATES CONSTITUTION NOR TRIMBLE V. GORDON IMPACT UPON THE STATE LAW WITH RESPECT TO RETROACTIVITY. THE LAW IN EFFECT AS OF THE DATE OF DECEDENT'S DEATH MUST CONTROL THE DESCENT AND DISTRIBUTION OF THE ESTATE. TRIMBLE SHOULD NOT NOW BE EXPANDED SO AS TO BE APPLIED RETROACTIVELY.

If this Court were to conclude that this appeal has been providently granted, that the Appellant has standing, that adjudication would not require overturning findings of fact by the state court, that a decision on the merits would necessitate no construction of state law by this Court, nor creation of a federal common law, nor issuance of an advisory opinion, then as to the merits, it is clear that Appellant cannot prevail.

In considering this case on the merits, several critical factors render Appellant's claim outside the boundaries of relevant previous decisions of this Court.

FIRST. This is the only case wherein the issue of paternity was directly and specifically reviewed by the

court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller on the Constitution, 314" * * * "Such judgement [advisory opinion] will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgement could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question." Muskrat v. United States, 219 U.S. 346, 356, 362 (1911) (striking down a Congressional attempt to give the Court jurisdiction beyond the Constitution to settle an Indian land dispute).

^{72. &}quot;[I]f a construction of the statute is fairly possible by which the question may be avoided [the constitutional issue will be by-passed]" Rescue Army v. Municipal Court, 331 U.S. 549, 568-569 (1947). See also New York Transit Authority v. Beazer, supra at 582, n.22 and cases cited therein.

state courts and the issue decisively resolved against the Appellant.

SECOND. This is the only case presented to this Court wherein the child was subsequently adopted. As Appellant herself concedes, "Adoption in Texas severs all legal relationship between parent and child[.]"

THIRD. This is the only case presented to this Court wherein the putative parent had been adjudicated non compos mentis.

FOURTH. This adjudication, coupled with the alleged father's undisputed chronic alcoholism, renders his ambivalent statements that "he could have been [appellant's]⁷⁴ father," and "he was the father, reasonably sure, of a child born out of wedlock" sufficient to allow the Texas court to conclude that it was suspect.

FIFTH. This is the only case presented to this Court that lacks a positive, unambiguous acknowledgement of paternity on the part of the putative parent.

SIXTH. This is the only case presented to this Court wherein evidence of familial contact between the putative father and illegitimate child is wholly lacking.

SEVENTH. This is the only case presented to this Court wherein the alleged father of the illegitimate child played no role in the upbringing, nurturing, guidance, or parenting of the child.

EIGHTH. This is the only case presented to this Court where the putative father and illegitimate child did not live together, in a family unit, in the same house, under the same roof, for a significant period of years, indeed at all.

NINTH. This is the only case presented to this Court where there is absolutely no evidence of the purported father ever contributing financially to the child during his lifetime.

Appellant candidly admits that there was no familial relationship between herself and the man she alleges was her father.

Delynda was adopted as a small child. Like many adopted children, she had no idea that she was illegitimate, nor had she any reason to know. * * * [S]he was unaware that she was illegitimate. * * * For Delynda to have been aware of her status of birth, and of her constitutional right of the equivalent of Chapter 13 benefits, she would had to have been a constitutional scholar and a private detective. Brief of Appellant at pp. 81-84.

Even though Appellant has already conceded there was no familial relationship or contact with her alleged father, *infra*, she acknowledges—as she must—that establishment of paternity is crucial to her cause of action. At least Appellant does so by implication, but then intermixes that admission into a novel assertion regarding the Fourteenth Amendment that apparently has never been advanced prior to this action, *viz*:

Delynda's convincing proof⁷⁵ of paternity in the present action should be viewed as satisfying the constitu-

^{73.} Appellant's Jurisdictional Statement, p.9. Appellant's full admission is "Adoption in Texas severs all legal relationship between parent and child, except that the right of a *legitimate* child to inherit directly from its natural parent is not extinguished." Id., (emphasis added). Appellant prosecutes this appeal as an *illegitimate* child. Appellant has made no attack on this provision of Texas law regarding adoption.

^{74.} Or, "Delynda" as the Appellant insistently and incessantly refers to herself in the brief. Appellant's Jurisdictional Statement, p. 6, n.1. It is not without significance that the latter quotation does not specify or identify the child that Ricker was "reasonably sure" he sired. Further, it will be noted that these quotations, which Appellant claims demonstrate "clear and convincing" evidence of paternity, are Appellant's own descriptions of the evidence. Not surprisingly, Appellant has portrayed the evidence to draw out every possible favorable inference to her case. And yet, even though the statements are filtered through Appellant, the best she can claim is that Prince Ricker "could" be the father and was "reasonably sure" he was the father of some unidentified illegitimate child. To claim that evidence of this caliber is "clear and convincing" strains credulity. It is thus no surprise that the Texas courts came to the conclusion that the evidence of paternity was woefully insufficient.

^{75.} Specifically held to be unavailing by the Texas courts.

tional prerequisites to a Fourteenth Amendment remedy which is the equal of the statutory benefits of the Family and Probate Codes. *** Regarding the Family Code, her Fourteenth Amendment remedies include full legitimation, heirship, and attorney's fees. Brief of Appellant at p. 19.

Appellee recognizes that it is fully within the power of this Court to proscribe inequity in treatment between legitimate and properly acknowledged illegitimate children. It is argued, however, that this Court has no power under the Fourteenth Amendment, or any other provision of the Federal Constitution, to order that Appellant be deemed "fully legitimate" under the Texas Family Code.

This Court could hold that Appellant must be afforded treatment equal to that of legitimates, but it cannot transform her into a legitimate.

TRIMBLE SHOULD NOT BE APPLIED RETROACTIVELY

Appellee will first deal with the central thesis of Appellant's plea, and then in sequence other contentions raised by the Appellant.

Appellant should not benefit from retroactive application of *Trimble* by operation of *Chevron Oil v. Huson.* 404 U.S. 97 (1971). It is critical to note that though *Chevron* is cited by Appellant for formulation of the "retroactivity test", the case specifically held that as a general rule, state statutes of limitation should govern. *Id.* at 100.76 Application or creation of federal limitations statutes

amounts to an inappropriate creation of federal common law. Even when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply state statute of limitations for analogous types of actions.

Chevron Oil v. Huson, supra at 104.

Thus, Chevron counsels the need to refrain from creation of an impermissible common law and strictly adhere to the prevailing rule that state statutes of limitations or laches doctrine should govern.

Even under *Chevron's* retroactivity test, it is apparent that *Trimble* should not be applied retroactively.

In our cases dealing with the retroactivity question. we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [cite omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [cited omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. [cite omitted] Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [cite omitted]. Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [cite omitted].

Chevron Oil v. Huson, supra at 106-107.

As to the First factor: Trimble is a sharp break with past precedent whose result was not clearly foreshadowed. Trimble has been interpreted as overruling Labine v. Vincent, supra. Estate of Sharp, 151 N.J. Super. 579, 377 A.2d 730, 732 (Ch. Div. 1977), aff'd, 163 N.J. Super. 148, 394 A.2d 381 (App. Div. 1978); See also Pendleton v. Pendleton, 560 S.W.2d 538 (Ky. 1977) ("Pendleton II"); Cf. Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1975) ("Pendleton I"), vacated and remanded for consideration in light of Trimble.

^{76.} Chevron decided the issue in the context of personal injury actions arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. cited at 404 U.S. 97, 98.

Appellees in this case specifically relied upon the non-retroactivity of *Trimble* in their positions advanced, and arguments made before the Texas courts. *Reed v. Campbell, supra*. Appellees-have already been injured in this case by speculation that *Trimble* might apply retroactively. Appellant has been able to keep the estate tied up for years with her claim. She has been able to do so solely by her advocacy of *Trimble* retroactivity.

As to the Second Factor: Retroactive application of *Trimble*, in the context of this case, would be a nullity. The Texas Legislature through the 1977 and 1979 revamping of § 42 of the Probate Code has already cured the defect proscribed by *Trimble*. The evidentiary standard of the Texas courts precludes Appellant from establishing paternity due to the quality and quantum of evidence she proffered.

The injury of which Appellant complains is not likely to recur. All probate impacting upon the rights of illegitimates has for over seven years been regulated by the revised § 42 of the Probate Code which is in full alignment with *Trimble*. Seven years after the revision of the Texas Probate Code and nearly a full decade after *Trimble*, the chance of repetition is virtually nil.

Third Factor: This case involves protection of the estate from further claims such as Appellant's, that the state courts have already concluded have no basis in law or in fact. Reed v. Campbell, supra.

A further factor worth noting is that although Appellant relies upon *Chevron* for its retroactivity test, this Court, in the 15 times it has cited to *Chevron* since the case was decided sixteen years ago has *never* used the case to apply a decision retroactively.⁷⁷

Retroactive application of the case was rejected in every one of the holdings in which *Chevron* appears, save one, and that was a criminal case. And in that case, *Chevron* was not used as the vehicle for retroactivity. See n.77, *supra*. Three of the cases in which *Chevron* appears had no retroactivity issue at all. Two cases were summary-one dismissed, the other vacated.

In the only two cases to come before this Court in which Chevron was advanced for the argument of retroactivity, the proposition failed. In Northern Pipeline Construction Co. v. Marathon Pipeline Co., supra at 87-88, this Court in a plurality opinion specifically rejected retroactive application of its holding via operation of Chevron. In Heckler v. Edwards, supra, the District Court had used Chevron to apply its own decision retroactively. That decision was reversed by this Court.

There is a good reason for Appellant's reliance on Chevron to argue retroactivity, and then her striking si-

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^{77.} These cases are: Lemon v. Kurtzman, 411 U.S. 192 (1972) ("Lemon II") (retroactively rejected, Chevron mentioned only tangentially); Gosa v. Mayden, 413 U.S. 665 (1972) (retroactivity rejected, Chevron mentioned in one footnote in dissent); Edelman v. Jordan, 415 U.S. 651 (1973) (no retroactivity, case decided on other grounds, Chevron mentioned in one footnote); (Continued on following page)

United States v. Peltier, 422 U.S. 531 (1975) (retroactivity rejected, Chevron mentioned tangentially by majority, cited in one footnote by dissent); Allison v. Fulton-DeKalb Hospital Authority, 449 U.S. 939 (1980) (summary dismissal for lack of jurisdiction, Chevron mentioned in passing in one footnote in dissent); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1980) (no retroactivity issue, Chevron cited for proposition that state law limitations control); Consolidated Foods Corp. v. Unger, 456 U.S. 1002 (1982) (summary vacating and remand of judgment, Chevron mentioned once in concurrence); United States v. Johnson, 457 U.S. 537 (1982) (criminal case, limited to Fourth Amendment cases. Chevron irrelevant to decision): Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) (retroactivity through Chevron specifically rejected); DelCostello v. Teamsters, 462 U.S. 151 (1983) (limitations question, Chevron mentioned once in majority, cited in one footnote in dissent): Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (retroactivity rejected, Chevron mentioned briefly in concurrence); Solem v. Stumes, - U.S. --, 104 S.Ct. 1338 (1984) (criminal case, retroactivity rejected); Heckler v. Matthews. — U.S. —. 104 S.Ct. 1387 (1984) (retroactivity rejected); Heckler v. Matthews, -- U.S. --, 104 S.Ct. 1387 (1984) (retroactivity rejected. Chevron cited once); Heckler v. Edwards, — U.S. —, — S.Ct. — - L.Ed.2d -, 52 U.S.L.W. 4373 (1984) (District Court used Chevron to retroactively apply holding, overruled by this Court).

lence when it comes to other cases in support of the argument. There are none from this Court. This Court has never brought the concept as far as Appellant argues. Indeed, when faced with a like contention, this Court refuted it in Northern Pipeline.

Chevron is far from the clarion call for retroactivity that Appellant makes it out to be. The very holding within the Chevron opinion itself came down on the side of non-retroactivity: "[w]e conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case." Chevron Oil v. Huson, supra at 107.

It is not known from where Appellant comes to the conclusion that decisions of this Court have a determinative presumption of retroactivity in the civil field. It cannot be from any textual provision of the Constitution itself, for as Mr. Justice Cardozo noted for the unanimous Court in Great Northern Railway Co. v. Sunburst Oil & Refining Co., supra at 364, "[T]he federal constitution has no voice upon the subject." Nor can it be from the decisions of this Court, where the clear import of the holdings is that retroactivity is disfavored in the civil context. Lemon v. Kurtzman, 411 U.S. 192, 198-199 (1972).

Further counsel against retroactive application of *Trimble* through the never-utilized *Chevron* vehicle is *Gosa v. Mayden*, 413 U.S. 665 (1972) where retroactive reaction in the context of a criminal case (courts martial) was rejected.

A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of the state action, we thus seek only the assurance that the classification at issue bears some fair relationship to legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1981).

This Court has consistently noted that differing standards of proof for establishing maternity and paternity of illegitimate children is acceptable due to the relative problems of proof. Matters of probate are the responsibility of the various states:

[T]he settlement and distribution of decedents' estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; . . . the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with operations of state tribunals invested with that jurisdiction [.]

Harris v. Zion's Bank, 317 U.S. 447, 450 (1943) Accord Trimble v. Gordon, supra at 771.

Inherent differences in establishing maternity and paternity justify a more demanding standard for paternity:

[A legitimate] state goal is to provide for the just and orderly disposition of property at death. We have long recognized that this is an area with which the States have an interest of considerable magnitude. * * * This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult. As one New York Surrogate's Court has observed: "[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is the child of a particular woman is rarely difficult to prove." [cite omitted]. Proof of paternity, by contrast frequently is difficult when the father is not part of a formal family unit. "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know who is responsible for her pregnancy." [cite omitted] [emphasis in original]

Lalli v. Lalli, 439 U.S. 259, 268-269 (1978)

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The Texas Legislature's abolition of the discriminatory sections of the Probate Code post-*Trimble* is a clear example of this Court's opinion in *Vance v. Bradley*, 440 U.S. 93, 97 (1978):

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. (footnote omitted)

TRIMBLE AND STATE RETROACTIVITY

The argument advanced in Vance v. Bradley calling for the democratic process to solve many of the problems coming before this Court reflects a respect for the concept of comity. At the very least where the courts or Constitution have not spoken states should be left to good faith procedural remedies.

Historically, there was a presumption that decisions should be given retroactive effect but the modern trend is that when a court does not specifically mandate that a decision is to be given retroactive effect the lower courts have the discretion to determine the extent to which they will apply a decision retroactively. (10 A.L.R.3d 1371, § 81(a) at 1398-1399).

State case law regarding this issue has used the "date of filing" analysis discussed previously. The state courts have generally held that when the intestate died prior to Trimble and the application to determine heirship was filed after Trimble then Trimble would not be applied retroactively. The only time the state courts have been willing to apply the Trimble decision retroactively is when the illegitimate had a case pending on April 26, 1977, the date of the Trimble decision.

In order to determine whether *Trimble* will be applied retroactively in this case it is necessary to review relevant Texas case law. *Winn v. Lackey*, 618 S.W.2d 910 (Tex. Civ. App. 1981), involved the inheritance rights of an illegitimate child. The father had died prior to *Trimble* and

the illegitimate child had not filed suit to determine heir-ship until after Trimble.

Relying on the rationale of Frakes v. Hunt, 583 S.W.2d 497 (Ark. 1979), Winn held that Trimble should not be applied retroactively in order to prevent chaotic title conditions. Winn v. Lackey, supra at 912. The putative father in Winn died in April, 1973, therefore § 42 of the Texas Probate Code as enacted in 1955 was applied and the child was denied paternal inheritance.

The court in Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App. 1978, ref'd, n.r.e.), addressed the issue whether § 42 of the Texas Probate Code as enacted in 1955 was constitutional in light of the Trimble decision. Lovejoy held that § 42 violated the Equal Protection Clause of the United States Constitution. Id. at 504. Lovejoy did not involve a retroactive application of Trimble because Lovejoy was pending at the time of the Trimble decision. Winn v. Lackey, supra at 912.

In the present case, the Texas Court of Appeals followed the rule in Winn v. Lackey, supra, Reed v. Campbell, supra at 700. The lower court followed the "time of filing" test and held that it would not apply Trimble retroactively when the application for heirship was made after Trimble. The court would only recognize retroactive application when the suit was on file at the time the Trimble decision was decided. Id. See also Pendleton v. Pendleton, 560 S.W.2d 538 (Ky. 1977); Allen v. Harvey, 568 S.W.2d 829 (Tenn. 1978); Compton v. White, 587 S.W.2d 829 (Ark. 1979); and Ford v. King, 594 S.W.2d 227 (Ark. 1980).

Appellant cites to four cases arguing that they have applied *Trimble* retroactively and are similar to the present case Appellant's Jurisdictional Statement, Appendix at C-6-13. Those cases do not apply *Trimble* to the extent Appellant is requesting this court to apply it.

For example, in *Gross v. Harris*, 664 F.2d 667 (8th Cir. 1981), the court expressly noted that had the case dealt

with inheritance rights, their decision may have been different. Id. at 671. With respect to Pendleton, it clearly comes within the exception provided for by the "date of filing" test. See also Matter of Estate of Sharp, 394 A.2d 381 (Sup. Ct. N.J. 1978). In Marshall v. Marshall, 670 S.W.2d 213 (Tenn. 1984), the court did not examine the retroactivity of Trimble, it addressed the issue of whether Allen v. Harvey, supra, should be applied retroactively.

There is a clear trend in current state case law adopting the "date of filing" test and those courts have applied the law in the state as of the date of death and have not applied the *Trimble* decision retroactively. Under the "date of filing" test, if the putative father died intestate prior to April 26, 1977 and the suit or application to determine heirship was filed after that date, then *Trimble* will not be applied retroactively. The only exception is for cases pending at the date of the *Trimble* decision. In that event, the courts will apply the *Trimble* rationale to the statute.

V

AN ILLEGITIMATE CHILD WHO FAILS TO IN-HERIT UNDER THE THREE POSSIBLE METH-ODS OF LEGITIMATION STATUTORILY PRO-VIDED CAN CLAIM NO EQUAL PROTECTION VIOLATION WHEN THE LEGISLATION IN QUES-TION IS SUBSTANTIALLY RELATED TO A LEGI-TIMATE STATE GOAL.

At common law an illegitimate child had no rights of inheritance from either natural parent. The harsh result was that such a child was considered nullius fillius, the child of nobody. The child was not only precluded from inheriting, he also could have no heirs except those of his body. Allen v. Harvey, supra at 831. The state legislatures slowly began to recognize the illegitimate child's rights to maternal inheritance and the laws have continued to evolve.

Section 42 of the Texas Probate Code was originally enacted in 1955; it provided illegitimate children with full

maternal inheritance rights and for paternal inheritance rights if the natural parents married. Section 42 was amended in 1977. As amended, the statute provided for a voluntary legitimation proceeding. In 1979, the legislature again amended § 42 to provide for involuntary, as well as voluntary, legitimation proceedings and for full paternal inheritance rights upon legitimation.

Section 42 was amended twice before this case was tried. Appellee argues that if this Court should reverse the lower court and apply *Trimble* retroactively, then § 42 in its present form should be applied.

Under § 42, in its present form, three alternative methods of legitimation are provided. The first is if the child is born or conceived before or during the marriage of his mother and father. The second is if the child is legitimated by a court decree, as provided by Chapter 13 of the Texas Family Code. The third method is if the father executed a statement of paternity as provided by § 13.22 of the Texas Family Code or a like statement properly executed in another jurisdiction. If the child is legitimated under one of these three procedures he is entitled to inherit from his father, as well as his paternal kindred.

Does § 42 in its present form impermissibly discriminate against illegitimate children? Two tests have evolved. The first is the "insurmountable barrier" test, initially used in *Gomez v. Perez, supra*. The second is the "substantial relationship" test, *Handley v. Schweicker*, 697 F.2d 999, 1002 (11th Cir. 1983).

In Mills v. Habluetzel, this Court utilized both tests to determine the constitutionality of a Texas statute that provided a one year statute of limitations for paternity proceedings. It was determined that one year failed to provide an adequate opportunity for a paternity suit to be brought in order to obtain support. Id. at 100. The statute failed both tests and was found to be a violation of the Equal Protection Clause of the Fourteenth Amendment. Id. at 100-101.

After Mills, both tests must be applied to § 42 (1979) to determine whether it violates illegitimate children's rights to equal protection.

Section 42 (1979) does not present an insurmountable barrier to claims of inheritance by illegitimate children. Section 42 provides alternative methods of legitimation to all illegitimate children. It provides for both voluntary and involuntary means for a child to be legitimized. A putative father may execute a statement of paternity at any time during his life or he may marry the natural mother at any time after the birth of the child. The other alternative is a court decree to establish paternity under Chapter 13 of the Family Code.

Chapter 13 of the Texas Family Code provides for the procedures through which a court decree may be obtained. The effective date of Chapter 13 is September 1, 1975. The question became, what of illegitimate children born prior to the effective date of the statute?

In Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. 1979, no writ), the court considered this question and held that children born prior to the effective date of Chapter 13 had a common law remedy to establish paternity.

Since the Appellant was entitled to all three procedures there was no insurmountable barrier presented by § 42.

Section 42 bears a substantial relation to permissible state interests and is carefully tuned to alternative considerations. The primary state goal underlying § 42 is to provide for prompt and orderly disposition of property upon death. This has long been recognized as a legitimate state interest. See e.g., Lalli v. Lalli, supra; Trimble v. Gordon, supra at 771; and Labine v. Vincent, supra at 538.

The other state goal, which underlies § 42, is to prevent fraudulent claims of inheritance. Based on the problems of proving paternity, it has been recognized that stricter standards for illegitimate children claiming under

estates are justified. Trimble v. Gordon, supra at 770. In fact, this Court has recognized the problems of proving paternity several times. Mills v. Habluetzel, supra at 97; Lalli v. Lalli, supra at 269; Trimble v. Gordon, supra at 772; and Gomez v. Perez, supra at 538.

In recent years methods of paternity testing have advanced greatly and with the use of HLA tests paternity can be predicted with a high degree of probability. Yet, this Court has recognized that the existence of these tests does not lessen the state's interest in preventing fraudulent claims. Mills v. Habluetzel, supra at 98.

Thus, it is clear that § 42 (1979) provides for full paternal inheritance rights, once the illegitimate child's paternity has been established or the child is legitimated, as well as full maternal inheritance rights. Section 42 (1979) is substantially related to a legitimate state interest and therefore does not do violence to the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated Appellee prays that this Court dismiss the appeal *en toto* as improvidently granted. In the alternative, assuming this Court entertains the merits of this claim, Appellee prays that the decision of the Court below be affirmed.

Respectfully submitted,

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